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In The

Supreme Court of the United States

October Term, 1997

ESTEBAN ORTIZ, *et al.*,

Petitioners,

vs.

FIBREBOARD CORPORATION, *et al.*,

Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Fifth Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF SECURITIES AND COMMERCIAL LAW ATTORNEYS (NASCAT) IN SUPPORT OF RESPONDENTS

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BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF SECURITIES AND COMMERCIAL LAW ATTORNEYS (NASCAT) IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE[1]

The National Association of Commercial Law Attorneys (NASCAT) is an association of law firms and attorneys who litigate cases involving antitrust, commercial, consumer, employee and retiree benefit, environmental, and securities fraud claims in federal and state courts. NASCAT's members frequently represent victims of corporate abuse, schemes to defraud, defective products, and anti-competitive conduct. In civil actions challenging such wrongdoing, NASCAT's members not only seek compensation for victims, but also attempt to deter wrongdoers, modify corporate behavior, and improve victims' access to justice.

In literally thousands of cases filed over the past 30 years, NASCAT's members have represented plaintiffs in class actions brought under Federal Rule of Civil Procedure 23, or its state law equivalents, including innumerable cases settled or tried to verdict. In each of those cases, NASCAT's members and their clients (the proposed class representatives) have sought to satisfy the adequate representation requirement of Rule 23(a)(4). Several of those cases have involved classes certified

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[1] Letters of consent to the filing of this *amicus* brief received from Petitioners' and Respondents' counsel have been filed with this Court. Pursuant to Supreme Court Rule 37.6, NASCAT certifies that no counsel for any party authored this brief in whole or in part and no person or entity other than *amicus curiae* made any monetary contribution to its preparation or submission.

under subdivision (b)(1)(B) of Rule 23, including *In re Drexel Burnham Lambert Group*, 960 F.2d 285 (2d Cir. 1992), in which the Second Circuit affirmed Judge Pollack's certification of claims brought by securities claimants against Drexel, a bankrupt securities brokerage firm, and affirmed the trial court's approval of a $350 million settlement. *Drexel* and other decisions issued by the lower federal courts since Rule 23 was amended in 1966 demonstrate that subdivision (b)(1)(B) must be applied flexibly, not restrictively, in accordance with the particular facts and circumstances of each individual case and that, if the trial court properly considers the evidence proffered by the parties and makes requisite findings of fact and conclusions of law in certifying the class under this provision, its judgment should be affirmed on appeal.

As a result of its members' collective experience, NASCAT believes and advocates in this *amicus curiae* brief that the district court properly certified the class under Rule 23(a)(1)-(4) and (b)(1)(B) and properly approved the Global Settlement Agreement in this case.[2]

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[2] The district court's Memorandum Opinion certifying the class and approving the settlement is reported as *Ahearn v. Fibreboard Corp.*, 162 F.R.D. 505 (E.D. Tex. 1995), and is reproduced as Appendix E to the Petition for Writ of Certiorari (Volume I) (the "Petition"), CA 183a-242a. The district court's Findings of Fact are reported as *Ahearn v. Fibreboard Corp.*, Civil Action No. 6:93cv526, 1995 U.S. Dist. LEXIS 11532 (E.D. Tex. July 27, 1995), and are reproduced as Appendix F to the Petition (Volume II), CA 243a-468a. The district court's Conclusions of Law are reported as *Ahearn v. Fibreboard Corp.*, 1995 U.S. Dist. LEXIS 11523 (E.D. Tex. July 27, 1995), and are reproduced as Appendix G to the Petition (Volume III), CA 469a-511a. The district court's Supplemental Conclusions of Law are reported as *Ahearn v. Fibreboard Corp.*, 1995 U.S. Dist. LEXIS 11531 (E.D.

NASCAT also believes and advocates below that the Fifth Circuit properly affirmed the district court's entry of judgment. For the reasons that will be advanced, NASCAT files this *amicus curiae* brief in support of Respondents and respectfully submits that the decision of the court below should be affirmed.

INTRODUCTION AND SUMMARY OF ARGUMENT[3]

The district court and the Fifth Circuit correctly found that the proposed class representatives satisfied the prerequisites of Rule 23(a)(1)-(4), including the "adequacy of representation" requirement. The courts below correctly rejected arguments concerning purported "intraclass conflicts" posited by Petitioners and their *amici*, which amounted to potential, hypothetical, or theoretical conflicts that the federal courts have uniformly found not to defeat class certification.

The district court properly certified the class under Rule 23(b)(1)(B), finding that plaintiffs and class members shared a common "significant risk" of losing Fibreboard's insurance coverage if piecemeal litigation was allowed to proceed, and the Fifth Circuit properly affirmed that finding. As an *alternative* holding – one that this Court need

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Tex. July 27, 1995), and are reproduced as Appendix H to the Petition (Volume III), CA 512a-518a.

[3] Page references to the briefs filed by Petitioners and their *amici* are stated as "Pet. Brief. at ___" (Brief for Petitioners), "Law Professors Brief at ___" (Brief of Legal Ethics, Civil Procedure, and Constitutional Law Scholars as *Amici Curiae* in Support of Petitioners), and "Trial Lawyers Brief at ___" (Brief of *Amicus Curiae* Trial Lawyers For Public Justice, P.C., In Support Of Petitioners).

not reach – the district court properly certified the class under subdivision (b)(1)(B) by finding that a "limited fund" existed; the Fifth Circuit correctly affirmed that alternative holding.

ARGUMENT

I. THE COURTS BELOW PROPERLY FOUND THAT THE PROPOSED CLASS MET THE PREREQUISITES OF RULE 23(a) AND THAT THE INTERESTS OF THE CLASS REPRESENTATIVES AND THE MEMBERS OF THE CLASS ARE NOT ANTAGONISTIC

A. The Rulings Of The Courts Below

A class may be certified if all four prerequisites of Rule 23(a) are met and one or more of the provisions of Rule 23(b) is satisfied. *See Amchem Products, Inc. v. Windsor*, ___ U.S. ___, 117 S. Ct. 2231, 2245 (1997); 5 James W. Moore, *Moore's Federal Practice* ¶23.20, at 23-55 (2d ed. 1998) ("5 J. Moore"); 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure: Civil 2d* § 1759, at 97 (1986) ("7A Wright, Miller & Kane"). In this case, the district court found that the four prerequisites of Rule 23(a) – numerosity, commonality, typicality, and adequacy of representation – were met. *See* CA 223a-230a (162 F.R.D. at 523-26); CA 478a-484a (Conclusions of Law, ¶¶12-24); CA 513a-514a (Supplemental Conclusions of Law, ¶¶2-5). In the original appeal, the intervenors did not dispute the district court's finding of numerosity, but they argued that the class met none of the other Rule 23(a) prerequisites; the Fifth Circuit, however, rejected these contentions. CA 54a-72a (90 F.3d at 974-82); *see also* CA 2a-3a (134 F.3d at 670) ("We detailed

in our prior opinion our agreement with the thorough study and conclusions by the district court, satisfying the requirements of class certification under Rule 23(a).").

Petitioners and their *amici* now focus their attack upon Rule 23(a)(4)'s "adequacy-of-representation" requirement, seeking to persuade this Court that even a potential, hypothetical, or theoretical "conflict" between class members *per se* renders the class representatives inadequate. *See* Pet. Brief at 18-22; Law Professors' Brief at 9-12. Their arguments were raised in the courts below, were thoroughly analyzed by the district court and the Fifth Circuit, and were properly rejected.

B. Potential, Theoretical, Or Hypothetical Intra-class "Conflicts" Do Not Prevent Class Certification Under Rule 23(a)(4)

A class action may be certified by the district court only if "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This requirement ensures that the class be "adequately represented both by counsel and by the named representative plaintiffs." *Linney v. Cellular Alaska Partnership*, No 97-16637, 1998 U.S. App. LEXIS 20484, at *7 (9th Cir. Aug. 21, 1998) (citations omitted). "Adequate representation" depends on the qualifications of counsel for the class representatives, " 'an absence of antagonism, a sharing of interests between representatives and absentees [class members], and the unlikelihood that the suit is collusive.' " *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 390 (9th Cir. 1992) (citation omitted); *see also General Tel. Co. v. Falcon*, 457 U.S. 147, 159-60 n.13 (1982) ("adequacy-of-representation" requirement focuses on "conflicts of interest"). *See generally* 7A Wright, Miller & Kane,

§ 1768, at 326-66 (elucidating what constitute "antagonistic" or "conflicting" interests between class representatives and class members); 5 J. Moore, ¶23.25[4][b][i], at 23-118 (same).

In this case, after conducting an eight-day evidentiary hearing and properly taking the proposed settlement into account, *see Amchem*, 117 S. Ct. at 2248-49, the district court found that "[t]he Class representatives have . . . adequately represented the Class," CA 228a (162 F.R.D. at 525), rejecting the intervenors' arguments that there was a "conflict" between them and class members because they were united by a common interest in resolving Fibreboard's insurance coverage dispute:

> The Court concludes that the Class representatives have a sufficient stake in the outcome and that the interests of the Class representatives and the members of the class are not antagonistic. The Class representatives span the range of the various medical categories under the Trust Distribution Process and include both already-impaired and not-yet-impaired claimants. The class representatives and the members of the class – all of whom are equally at risk in the coverage litigation – are united in seeking the maximum possible recovery for their asbestos-related claims.
>
> The class representatives adequately represent those Class members whose injuries have not yet become manifest. The Complaint is expressly brought on behalf of unimpaired Class members; and unimpaired Class members have interests in the global settlement common with each of the Class representatives and are united with them in eliminating the risk of the coverage litigation by seeking the maximum possible settlement for the entire Class.

CA 482a-483a (Conclusions of Law, ¶¶22-23); *see also* CA 382a-386a (Findings of Fact, ¶¶279-88) (determining adequacy of Global Health Claimant Class Representatives). The district court found – and the Fifth Circuit agreed – that the class representatives and class members had an overriding common interest in achieving an immediate, class-wide resolution to the insurance coverage dispute. CA 361a-362a (Findings of Fact, ¶232); CA 98a (90 F.3d at 993). *See* 7A Wright, Miller & Kane, § 1768, at 359 ("potential conflict" between class representatives and members "should not preclude the use of the class action device if the parties appear united in interest against an outsider").

The extensive factual record in this case, including the testimony of 18 witnesses and the hundreds of documents introduced and considered by Jude Parker at the eight-day fairness hearing, reinforces the conclusion that the district court exercised its sound discretion in finding that the class representatives adequately represented the interests of already-impaired and not-yet-impaired claimants. The district court carefully considered, and properly rejected, the intervenors' contention that purported "intraclass conflicts" between class members – no matter how artificial or arbitrary – require the creation of subclasses.

Taken to their logical extreme, the arguments advanced by Petitioners and their *amici* would mean that any time an objector's lawyer could point to any type of potential, hypothetical, or theoretical "conflict" between class members, subclasses would have to be created and separate negotiating counsel appointed for each supposedly conflicting group (or sub-group). From

NASCAT's collective experience, which involves representing plaintiffs in thousands of class actions, the result likely would be chaos and many putative class actions never would be certified, let alone settled. Gratefully, the federal courts by and large have rejected the notion advanced by Petitioners and have properly exercised their sound discretion and refused to allow purely "potential" conflicts to derail class certification.[4]

Petitioners and their *amici* ignore the fact that the district court expressly considered the alleged "intraclass conflicts" they previously raised,[5] with Judge Parker

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[4] Thus, in a recent opinion, the Third Circuit affirmed the district court's finding that plaintiffs satisfied Rule 23(a)(4)'s adequacy of representation requirement:

> We believe the district court exercised its sound discretion when it found . . . the named plaintiffs adequately represent the class. . . .
>
> [T]he crux of this class action is the allegation that Prudential engaged in a scheme to defraud policyholders by means of company-wide deceptive sales practices. The named parties, like the members of the class, would need to establish this scheme in order to succeed on any of the claims in the Second Amended Consolidated Complaint. Even those class members with "other" claims share the common task of demonstrating the existence and implementation of this scheme. Consequently, we believe the proposed class satisfies the adequacy of representation requirement of Rule 23(a).

In re Prudential Ins. Co. of America Sales Practices Litig. Agent Actions, 148 F.3d 915, 1998 U.S. App. LEXIS 17057, at *87-88 (3d Cir. July 23, 1998).

[5] According to the district court, the Ortiz Intervenors contended that "intraclass conflicts" exist between each of the following pairings of groups of Global Health Claimant Class members: (1) class members who were first exposed to asbestos-

stating that the intervenors' expert witness "acknowledged at the fairness hearing that separate subclasses consisting of these various groups are not required, but he asserted that separate counsel should have been appointed to negotiate on behalf of the various interests of" class members. CA 414a (Findings of Fact, ¶343). As Judge Parker further stated:

> [T]he Court finds that Professor Leubsdorf's testimony on these points lacks credibility. *Professor Leubsdorf expressed the view that distinctions, often arbitrarily chosen, create conflicts that prevent ethical representation of a class even where the common interests shared by the class members vastly outweigh the distinctions among them, and the settlement fairly accommodates all interests.* The Court takes judicial notice that, were this view to be correct, numerous settlements reflecting far more blatant distinctions among intraclass groups would necessarily have been the product of unethical conduct.

CA 414a (Findings of Fact, ¶344) (emphasis added). The Fifth Circuit agreed, noting that "[t]he record amply supports [the district court's] findings." CA 62a (90 F.3d at 978).

The experience of NASCAT members in securities fraud cases demonstrates that creative lawyers whose intent is to oppose class certification or derail a potential settlement always can dream up supposed "conflicts"; however, the courts usually (and properly) find that these

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containing products prior to March 15, 1959, and those who were first exposed after that date; (2) class members who have already suffered a "cognizable" asbestos-related injury and those who have not yet suffered such an injury; and (3) class members who will be individually represented in filing their claims against the Trust by plaintiffs' counsel and those who will not. CA 413a-414a (Findings of Fact, ¶343).

supposed intraclass "conflicts" are far outweighed by the *common* interests of class members. *See Blackie v. Barrack*, 524 F.2d 891, 908-10 (9th Cir. 1975) (securities fraud class action; rejecting notion that conflict existed between those class members who sold corporation's stock during class period and those who retained it).[6] If Petitioners were correct and the sort of hypothetical "conflicts" between class members that they posit preclude an adequacy-of-representation finding under Rule 23(a)(4), then defrauded shareholders never could represent bondholders in securities class actions, *cf. In re American Continental Corp./Lincoln Savings & Loan Securities Litigation*, 140 F.R.D. 425 (D. Ariz. 1992) (denying motion to decertify class of more than 20,000 shareholders and bondholders); current employees never could represent former employees in benefit actions, *cf. Walsh v. Northrop-Grumman Corp.*, 162 F.R.D. 440, 447-48 (E.D.N.Y. 1995) (ERISA action; potential antagonism between current and former employees was too speculative to cause inadequate representation); and current employees who were the victims of racial or sexual discrimination never could represent each other, *cf. Orlowski v. Dominick's Finer Foods*, 172 F.R.D. 370, 374 (N.D. Ill. 1997) (any finding that named plaintiffs' interests conflict with those of class members "because all competed for a scarce number of promotion

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[6] *See also Kalodner v. Michaels Stores, Inc.*, 172 F.R.D. 200, 208 (N.D. Tex. 1997) (no conflict of interest between earlier and later purchasers of stock); *In re Cirrus Logic Sec. Litig.*, 155 F.R.D. 654, 663 (N.D. Cal. 1994) (same; current shareholder could adequately represent former shareholders); *Zinberg v. Washington Bancorp, Inc.*, 138 F.R.D. 397, 408 (D.N.J. 1990) (plaintiff who purchased stock based upon broker's advice could adequately represent those who did not).

opportunities" would " 'doom[ ]' " every class action charging discrimination in promotion) (citation omitted).

This Court should reject the notion advanced by Petitioners and their *amici* that any sort of "intraclass conflict," no matter how potential, hypothetical, or theoretical, should be permitted to prevent class certification – or approval of a settlement – under Rule 23(a)(4)'s "adequacy-of-representation" requirement. Rather, as the courts and commentators have recognized, if the class members are united in interest against an outsider, that union outweighs any potential conflicts.

II. THE COURTS BELOW PROPERLY CERTIFIED A CLASS UNDER RULE 23(b)(1)(B)

A. The Rulings Of The Courts Below

Rule 23 provides that a class action may be maintained if the prerequisites of subdivision (a) are satisfied and, in addition, "the prosecution of separate actions by or against individual members of the class would create a *risk* of . . . adjudications with respect to individual members of the class which would *as a practical matter* be dispositive of the interests of the other members not parties to the adjudications or *substantially impair or impede* their ability to protect their interests." Fed. R. Civ. P. 23(b)(1)(B) (emphasis added). In this case, the district court certified the class under Rule 23(b)(1)(B), finding that "[t]he need to protect Class members' 'common interests' in the insurance proceeds subject to the coverage dispute demands a unitary resolution permitting equitable distribution," and that – absent a unitary resolution – a "significant risk" existed that "allowance of individual adjudications by class members" would result in the coverage being lost, and with it the class members' only prospect of meaningful recovery. CA 231a, 232a (162

F.R.D. at 526, 527). Moreover, as an *alternative* holding, the district court found that although Rule 23(b)(1)(B) "does not require" a limited fund, "there is a limited fund in this case." CA 233a (162 F.R.D. at 527) (citing 491a-492a) (Conclusions of Law, ¶¶37-39).

The Fifth Circuit affirmed the district court's analysis and conclusions, both in its original opinion, CA 72a-85a (90 F.3d at 982-88), and after remand from this Court, CA 2a-3a (134 F.3d at 670). NASCAT respectfully submits that, given the facts and circumstances of this case, the language and purpose of Rule 23(b)(1)(B), as well as relevant federal court precedents, the district court properly certified the Class and approved the settlement of this case, and the Fifth Circuit correctly affirmed that judgment.

B. The Language And Meaning Of Rule 23(b)(1)(B) And Its Prescribed Interpretation

As the district court observed, "Rule 23 is to be interpreted according to its 'plain meaning,' " 230a (162 F.R.D. at 526) (citing *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 123 (1989)), and the express language of subdivision (b)(1)(B) directs the lower courts to weigh the *practical* effect of separate actions upon class members. As emphasized by Professor Kaplan, the Reporter to the Advisory Committee when Rule 23 was revised in 1966:

> In new subdivision (b)(1)(B) the Committee took up a vantage point within the class, and spied out situations where lawsuits conducted with individual members *would have the practical if not technical effect* of concluding the interests of the other members as well, or of impairing the ability of the others to protect their own interests.

Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*,

81 Harv. L. Rev. 356, 388 (1967) (emphasis added). Subdivision (b)(1)(B) applies to "situations where the judgment in a nonclass action by or against an individual member of the class, while not technically concluding the other members, *might do so as a practical matter.*" Advisory Committee Notes to 1966 Amendments, 39 F.R.D. 69, 100-01 (1966) (emphasis added) ("Advisory Committee Notes").[7]

Because of this emphasis on the *practical* effects of separate adjudications, "the determination of whether a particular action falls within the ambit of the rule depends largely on the facts of each case." 7A Wright, Miller & Kane, § 1774, at 443. An examination of the reported cases demonstrates that the federal courts' construction and application of subdivision (b)(1)(B) has been motivated by the real life practical importance of providing people a collective procedure for remediating their claims when the alternative of leaving them to individual lawsuits creates a risk of prejudice, unequal treatment, or incomplete relief. Moreover, reference to the ample factual record in this case demonstrates that the district court conducted the requisite analysis of the facts

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[7] Other commentators on subdivision (b)(1)(B) concur. *See* 5 J. Moore, ¶23.42[1], at 23-172 ("Rule 23(b)(1)(B) focuses on the members of the putative class and seeks to protect them against situations in which they would be prejudiced by separate litigation. In order to warrant class certification. . . . the risk of prejudice need only be practical, not legal or technical.") 7A Wright, Miller & Kane, § 1774, at 437 (Rule 23(b)(1)(B) does not require that individual adjudications be legally binding on absentees; rather, it "simply states that separate actions 'as a practical matter' would affect the absent parties without giving them the protection of representation in the action.") (footnote omitted).

and the "substantial risk" facing class members and properly certified a Rule 23(b)(1)(B) non-opt-out class.

C. Rule 23(b)(1)(B) Permits Certification Of Non-Opt-Out Classes In Cases Involving "Common Risks" To Class Members, Not Just Cases Involving "Limited Funds"

Contrary to the assertions of Petitioners and their *amici*, *see* Pet. Brief. at 23-31; Trial Lawyers Brief at 7-13, although the Advisory Committee Notes to the 1966 amendment to Rule 23 enumerated several types of cases in which a class would be properly certified under subdivision (b)(1)(B), *see* 39 F.R.D. at 101-02, these examples are by no means exclusive. One commentary on the federal rules emphasizes that "[s]everal other types of actions not mentioned by the Advisory Committee have been accepted by the courts under Rule 23(b)(1)(B)." 7A Wright, Miller & Kane, § 1774, at 445. Thus, although class certification under subdivision (b)(1)(B) is authorized in so-called "limited fund" cases,[8] and the district

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[8] Class certification in cases involving a "limited fund" was clearly envisioned by the drafters of modern Rule 23(b)(1)(B). *See* Advisory Committee Notes, 39 F.R.D. at 101 ("In various situations an adjudication as to one or more members of the class will necessarily or probably have an adverse practical effect on the interests of other members who should therefore be represented in the lawsuit. *This is plainly the case when claims are made by numerous persons against a fund insufficient to satisfy all claims.*") (emphasis added); *see also* 7A Wright, Miller & Kane, § 1774, at 441 ("An obvious example of the type of action to which Rule 23(b)(1)(B) is applicable is one in which the class members have claims against a fund that may prove insufficient to satisfy all of them.") (footnote and citations omitted); 5 J. Moore, ¶23.42[2][a], at 23-172 ("The most common use of Rule

court and Fifth Circuit properly reached the alternative holding that this case fits within that category, *see* CA 233a-234a (162 F.R.D. at 527), CA 72a-85a (90 F.3d at 982-88), affirmance in this Court need not exclusively rest upon a finding that a "limited fund" existed. *See* Advisory Committee Notes, 39 F.R.D. at 100-01.[9] In numerous reported cases that Petitioners ignore, the federal courts have properly certified classes under subdivision (b)(1)(B) because class members – whether plaintiffs *or* defendants – faced an unacceptable (but common) risk if they could not achieve a unitary resolution.

In *In re Alexander Grant & Co. Litigation*, 110 F.R.D. 528 (S.D. Fla. 1986), a securities fraud action, defrauded investors sought to certify over 300 partners in a national accounting firm (Grant) as a defendant class. Observing that the alternative to certification of a subdivision (b)(1)(B) class would require plaintiffs to conduct separate trials against the individual accounting partners, a result which it found would "unduly delay and postpone the ultimate resolution of the cases," *id.* at 537, the court stated that such piecemeal litigation, as a practical matter, would create an unacceptable risk for each putative class member:

23(b)(1)(B) class actions is in 'limited fund cases.' ") (footnote omitted).

[9] *See* CA 491a (Conclusions of Law, ¶37) ("A class may be certified under Rule 23(b)(1)(B) irrespective of whether a 'limited fund' may be said to exist.") (citing *White v. National Football League*, 822 F. Supp. 1389, 1411 (D. Minn. 1993), *aff'd on other grounds*, 41 F.3d 402 (8th Cir. 1994), and *Specialty Cabinets & Fixtures v. American Equitable Life Ins. Co.*, 140 F.R.D. 474, 477 (S.D. Ga. 1991)).

> [A] finding in the first trial that a Grant partner was responsible for authoring financial statements containing materially misleading information would substantially bar the other partners from asserting a contrary position. Thus, these partners would be foreclosed from defending their interests. . . .
>
> [T]he court finds that the only method for protecting the rights of Grant partners is to require their appearance, at one time, before this court. Thus, they will not be faced with an inability to defend their interests owing to a prior determination on the primary issue of liability.

Id. at 537-38 (footnote and citations omitted). In *Alexander Grant*, the district court also "note[d] the practical problem" presented by denying certification under subdivision (b)(1)(B): "Should individual partners be allowed to opt-out, this court faces the likely prospect of relitigating identical issues of law and fact in several trials. This occurrence would place an unnecessary burden upon the judicial system." *Id.* at 538.[10]

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[10] As in this case, *see* CA 233a-234a (162 F.R.D. at 527), in *Alexander Grant*, 110 F.R.D. at 538, the district court alternatively held that a "limited" (or "common") fund existed, thereby justifying (b)(1)(B) certification:

> Additional consideration must also be given to protecting the [accounting] partners' interests in a common fund – their professional liability insurance coverage. Separate adjudications conceivably would exhaust coverage leaving subsequently tried partners to pay legal fees from their own pocket and leave them with only personal assets from which to compensate plaintiffs. Thus, this court must concern itself with the interests of all partners while keeping an eye on the conservation of both partnership and individual assets.

Alexander Grant was followed by Chief Judge Ziegler in *In re Phar-Mor, Inc. Securities Litigation*, 875 F. Supp. 277 (W.D. Pa. 1994), another securities fraud action brought against an accounting firm (Coopers). The district court granted plaintiffs' motion to certify partners of the accounting firm as a defendant class under subdivision (b)(1)(B) because "the prosecution of separate actions would substantially impair the ability of the individual class members to protect their interests," and elucidated the common "significant risk" faced by class members:

> Because, under the theory of joint and several liability, all partners are legally responsible for the negligence of a single partner, a finding of liability against Coopers and any of the representative partners or principals would have a substantial effect on the interests of the putative class members. . . . Here, a finding that the negligent or fraudulent acts of a partner or partners were responsible for plaintiffs' losses would effectively foreclose any defense by the putative class members.

Id. at 280.[11]

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110 F.R.D. at 538. *Accord Alexander Grant & Co. v. McAlister*, 116 F.R.D. 583, 590 (S.D. Ohio 1987) (granting certification of class of counter-defendant accounting partners under Rule 23(b)(1)(B) because if investors' "class claims were tried in many separate suits, the first determination would practically dispose of the later ones, as earlier liability determinations could be used against individual partners in later cases").

[11] In *Phar-Mor*, 875 F. Supp. at 280, the district court reached the same alternative holding as in *Alexander Grant*, 110 F.R.D. at 538, as to the existence of a "common" (read "limited") fund, *see* note 10, *supra*, stating that "[s]uch concerns are also relevant here, where Coopers' insurance funds have been and will continue to be depleted during the prosecution of the

Phar-Mor was followed by Judge Lee in *In re Chambers Development Securities Litigation*, 912 F. Supp. 822 (W.D. Pa. 1995), a securities fraud action in which the district court certified a defendant class of 250 accounting partners under Rule 23(b)(1)(B) and (b)(3); the district court stated that "[a]s in *Phar-Mor*[ ], the prosecution of separate actions against individual Grant Thornton partners would substantially impair the ability of the individual class members to protect their interests, and fully comports with due process concerns." *Id.* at 836.

In these cases, as in the present case, the trial courts properly found that the potential prosecution of separate actions ("piecemeal litigation") created a "substantial risk" of impairment of individual class members' rights and interests, as Rule 23(b)(1)(B) requires, whether those class members were plaintiffs *or* defendants. In *Alexander Grant*, *Phar-Mor*, and *Chambers Development*, the class members – individual partners in accounting firms who had been sued for securities fraud – faced the practical risk of being unable to defend themselves if piecemeal litigation was conducted and one or more of the early cases established liability on the part of any one of them. While the common risk they shared was a function of partnership law, it is analogous to the common risk shared by class members in this case, as found by the district court: That the insurance coverage dispute would proceed absent a unitary resolution and would present a "substantial probability" that Fibreboard's claimed

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[defrauded investors'] actions, with the possible result that little or no funds will be available for the putative class members to use in defense of any claims brought against them in separate actions." 875 F. Supp. at 280.

insurance coverage – the class members' only source of recovery – would be lost. CA 230a-231a (162 F.R.D. at 526).

Petitioners and their *amici* ignore anotner body of related (and relevant) cases wherein classes are certified under subdivision (b)(1)(B) because the prosecution of separate actions could create a risk of inconsistent or varying adjudications. For example, in *Becher v. Long Island Lighting Co.*, 164 F.R.D. 144 (E.D.N.Y. 1996), an ERISA and state law action brought by current and former employees against their employer, its pension plan, and the plan administrator, the court found that the failure to certify a class of current and former employees who withdrew contributions from an employer-sponsored pension plan and sought to challenge a determination that their withdrawals resulted in a forfeiture of certain pension benefits would create a risk of inconsistent adjudications. The court observed that "[f]ailure to certify the class could result in multiple suits regarding the trustees' interpretation of" the plan, and "[e]ach case could conceivably result in different courts reaching conflicting decisions regarding not only the Plan's interpretation but also the applicability of the various defenses the defendants seek to impose." *Id.* at 153.[12]

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[12] *See also Death Row Prisoners of Pennsylvania v. Ridge*, 169 F.R.D. 618, 623 (E.D. Pa. 1996) (certifying class consisting of all present and future state death row inmates who had not yet filed petitions for habeas corpus review to challenge state's status under federal Antiterrorism and Effective Death Penalty Act); *White*, 822 F. Supp. at 1409 (in professional football players' antitrust class action against NFL challenging league's employment practices, finding that if individual players filed separate actions seeking injunctive relief, there was a substantial risk of inconsistent or varying adjudications).

The same "substantial risk" of piecemeal litigation which would invariably lead to inconsistent or varying adjudications regarding the availability and extent of Fibreboard's insurance coverage was clearly present in this case. The district court found that this coverage dispute (and, thus, the common risk to the class) could be resolved "only" through a unitary class action under Rule 23(b)(1)(B). CA 241a (162 F.R.D. at 530). As Judge Parker elaborated:

> Resolution of the insurance dispute required a unitary settlement in a proceeding in which all claims were compromised. On these facts, allowance of individual adjudications by class members would have destroyed the opportunity to compromise the insurance coverage dispute . . . and would have exposed the class members to the very risks that the settlement addresses – a situation that falls squarely under Rule 23(b)(1)(B).

CA 490a (Conclusions of Law, ¶35) (citations omitted); *see also* CA 231a-233a (162 F.R.D. at 526-27).

D. Rule 23(b)(1)(B) Also Permits Certification Of Non-Opt Out Classes In Cases Involving "Limited Funds"

As an *alternative* holding, the district court found that "the 'limited fund' may be viewed as the sum of the value of Fibreboard plus the value of its insurance coverage. . . . Under this scenario, the limited fund would equal at most approximately $1.77 billion." CA 492a (Conclusions of Law, ¶39) (citations omitted); *see also* CA 73a (90 F.3d at

982).[13] Rule 23 is intended to apply "when claims are made by numerous persons against a fund insufficient to satisfy all claims," Advisory Committee Notes, 39 F.R.D. at 101, and, under such circumstances, subdivision (b)(1)(B) " 'is designed to preserve the limited fund for the entire class against the individual claims of class members,' which claims might otherwise exhaust the limited fund and thereby leave subsequent plaintiffs with no remedy." *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1303 (2d Cir. 1990) (citations omitted). Class certification in "limited fund" cases is intended to "ensure that allocation of defendant's finite funds does not depend on which party rushes to the courthouse first

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[13] In this case, the district court properly held that "Rule 23(b)(1)(B) certification does not require a fixed asset or piece of property in which all class members have a preexisting interest." CA 489a (Conclusions of Law, ¶34); *see also* CA 233a-234a (162 F.R.D. at 527). As one treatise defines a "limited fund":

> A limited fund case is an action in which any recovery will come from a fixed pool of assets that is or may be insufficient to satisfy all of the claims against the fund. The fund must be the plaintiffs' sole source of recovery.
>
> *If the assets of the defendants, as extended by applicable insurance coverage but as limited by the insurers' assets, is insufficient to satisfy all of the plaintiffs' claims, the sum of those assets constitutes a limited fund. . . .*

5 J. Moore, ¶23.42[2][a], at 23-172 to 23-173 (emphasis added; footnotes omitted). Judge Parker's alternative holding – that the "limited fund" may be viewed as the sum of Fibreboard's net asset value plus the value of its insurance coverage, CA 492a (Conclusions of Law, ¶39) – fits squarely within the underscored language quoted above.

or chooses a courthouse that can render swifter results than others." 5 J. Moore, ¶23.42[2][a], at 23-173; *see also Coburn v. 4-R Corp.*, 77 F.R.D. 43, 45 (E.D. Ky. 1977) (Rule 23(b)(1)(B) certification granted: "In no event . . . should this litigation become an unseemly race to the courtroom door with monetary prizes for a few winners and worthless judgments for the rest."), *mandamus denied sub nom. Union Light, Heat & Power Co. v. United States District Court*, 588 F.2d 543 (6th Cir. 1978); *United States Trust Co. of New York v. Alpert*, 163 F.R.D. 409, 419 (S.D.N.Y. 1995) (same; "The Fund herein is . . . a finite one that would be depleted with each payout and would not be sufficient to pay all claimants. Its distribution should not depend on who rushes to the courthouses first or chooses those courthouses that can render swifter results than others.").[14]

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[14] As Professor Miller put the matter:

> The paradigm Rule 23(b)(1)(B) case is one in which there are multiple claimants to a limited fund . . . and there is a risk that if litigants are allowed to proceed on an individual basis those who sue first will deplete the fund and leave nothing for latecomers.

Arthur R. Miller, *An Overview of Federal Class Actions: Past, Present and Future* 45 (Fed. Jud. Center 1977). *See also In re Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d 721, 735 (2d Cir. 1992) (defining "classic instance of a 'limited fund' " as where "a group of claimants asserted claims of an aggregate amount that would deplete a fixed sum of money" and explaining that "a (b)(1)(B) class action is appropriate to avoid an unfair preference for the early claimants at the expense of later claimants"); *In re "Agent Orange" Prods. Liab. Litig.*, 100 F.R.D. 718, 725 (E.D.N.Y. 1983) (same), *aff'd*, 818 F.2d 145 (2d Cir. 1987).

The wealth of precedent involving limited fund cases has delineated the circumstances under which class certification will be permitted; in the words of one commentary:

> The availability of an action under subdivision (b)(1)(B) in this context not only is fair to all members of the class but it eliminates a serious threat of multiple litigation. *But the limited nature of the funds available to satisfy the individual claimants must be clear; a mere allegation that defendant has limited resources will be insufficient.*

7A Wright, Miller & Kane, § 1774, at 443 (footnote omitted).[15] As a result, when such proof is not adduced, or when the district court fails to require it or properly analyze it, certification under subdivision (b)(1)(B) will not be granted by the trial court or it will be reversed on appeal. *See, e.g., In re Bendectin Products Liability Litigation*, 749 F.2d 300, 305-06 (6th Cir. 1984) (district court was "clearly erroneous" in certifying (b)(1)(B) class in products liability action brought by persons exposed *in utero* to prescription drug to recover for injuries because certification order "state[d] without support" that "limited fund" existed and "[n]o findings were made on the record as to this conclusion").[16]

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[15] *See also* 5 J. Moore, ¶23.42[2][c], at 23-175 (to obtain Rule 23(b)(1)(B) certification "on the basis of a limited fund, a party must submit specific evidence showing that the fund may be depleted through individual litigation before all members' claims can be satisfied"); *In re First Commodity Corp. Consumer Accounts Litig.*, 119 F.R.D. 301, 312 (D. Mass. 1987) (same).

[16] *Compare In re Dennis Greenman Secs. Litig.*, 829 F.2d 1539, 1545-46 (11th Cir. 1987) (certification of class on basis that some plaintiffs might bankrupt potential sources of recovery if allowed to proceed individually was improper, absent specific

In this case, the district court heard eight days of testimony, including 18 witnesses, considered hundreds of documents and made extensive findings as to the

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findings of defendants' financial status); *In re Northern District of Calif. Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847, 851-52 (9th Cir. 1982) (error to certify a limited fund punitive damages class without hearing evidence of defendant's net worth, earnings, or available insurance coverage and establishing "as a fact" that defendant's assets were too limited to permit conventional litigation); *Clarke v. Advanced Private Networks, Inc.*, 173 F.R.D. 521, 522-23 (D. Nev. 1997) (same); *In re Telectronics Pacing Sys., Inc. Prods. Liab. Litig.*, 172 F.R.D. 271, 285 n.9 (S.D. Ohio 1997) ("The Court cannot certify a limited fund class without making findings concerning the existence of a limited fund"); *Fogie v. Rent-A-Center*, 867 F. Supp. 1398, 1403 (D. Minn. 1993) ("limited fund" doctrine could not be invoked when plaintiff consumers "have not produced evidence that there is a limited fund to satisfy judgment"); *with Doe I v. Karadzic*, 176 F.R.D. 458, 463 (S.D.N.Y. 1997) (in action brought on behalf of persons who suffered human rights violations at hands of Bosnian-Serb forces, certification was proper to preserve limited fund for benefit of entire class; "Class certification will prevent a situation where one plaintiff lays claim to the lion's share of defendant's limited resources, leaving thousands of others with nothing simply because they lost the race to the courthouse."); *"Agent Orange"*, 100 F.R.D. at 727 (following evidentiary hearing, district court concluded that there was "substantial probability that punitive damages, if allowed will, when added to compensatory damages, exceed defendants' assets"); *Coburn*, 77 F.R.D. at 45 (certification granted in personal injury and wrongful death actions arising from fire at supper club; plaintiffs demonstrated that claims in excess of $1.5 billion "have already been asserted in the suits now on file," judgments in the 164 actions for wrongful death "might reasonably exceed" $16 million, "[d]amages for injuries are not calculable at this stage" and defense counsel advised court that the corporate defendant had $3 million in assets).

existence of a "limited fund." *See, e.g.*, CA 491a (Conclusions of Law, ¶38) (citing CA 266a-272a, 291a-332a and 347a-348a) (Findings of Fact, ¶¶36-47, 89-181 and 203). These findings were properly affirmed by the Fifth Circuit. *See* CA 72a-85a (90 F.3d at 982-88), CA 2a (134 F.3d at 670). Indeed, the Fifth Circuit's original opinion in this case was followed by Judge Bechtle in *In re Orthopedic Bone Screw Products Liability Litigation*, 176 F.R.D. 158 (E.D. Pa. 1997), a products liability action brought against the manufacturer of pedicle screws (AcroMed). A "limited fund" class was certified because the parties offered evidence and expert testimony demonstrating that defendants' "net assets and insurance coverage are vastly insufficient to satisfy the many claims against them" and the "anticipated defense costs" to be incurred by the corporate defendant (AcroMed) "will alone be sufficient to consume [its] asset base"; Judge Bechtle observed that "[a]fter incurring those defense costs, AcroMed would have little or no ability to pay settlements or judgments to plaintiffs in individual cases." *Id.* at 177. Noting that the settlement would enable AcroMed to borrow $100 million and thereby increase the amount available to claimants, the district court analogized that case to this case:

> [T]here is neither a challenge, nor a basis for a challenge to the notion that this settlement can not be funded from cash on hand or from the liquidation of existing assets. It will be funded from an outside infusion of $100 million of borrowed funds not otherwise available except for the terms of the settlement. In this respect, this case shares much in common with *Ahearn*. In both cases, the settlement funds are provided

> primarily by non-defendants who have no obligation to provide them.

Id.

As the district court did in this case, in *Orthopedic Bone Screw* Judge Bechtle focused on the real life practical risks facing class members *and* the corporate defendant if Rule 23(b)(1)(B) certification was denied and the litigation continued with the foreseeable race to the courthouse and race to early judgments, necessarily taking into account the "unassailable history" of the litigation up to that point in time:

> In this case it is important to re-emphasize that it is the settlement itself that creates the fund from otherwise unobtainable outside resources. This infusion of new money is the *sine qua non* of the settlement. Without this infusion, the settlement cannot be accomplished and without the settlement, AcroMed will consume itself by exhausting all of its resources including its traditional borrowing potential. Because it is prudent to conclude from the unassailable history of this litigation that AcroMed can neither win nor avoid defending all of the cases presently proceeding against it, the conclusion that is equally unassailable is that the settlement is crafted around a limited fund. An unwillingness to recognize this will lead to the unacceptable result of many deserving claimants being unable to recover by settlement or judgment. This will surely follow the exhaustion of AcroMed's assets by either substantial use of resources in defense of all of the cases which course will be shortened by payments of recoveries by claimants earlier in time. This settlement shuts off AcroMed's defense cost flow and places all claimants on the same plane, at the same time, with respect to AcroMed's financial capacity to

> respond to all of the claims, leaving each claimant's share to be determined by traditional application of equitable distribution standards. If this settlement fails, the funds that AcroMed can raise conditioned on the settlement going forward will of course not be available to class members. The loss of the settlement fund is therefore a "risk" within the meaning of Rule 23(b)(1)(B).

176 F.R.D. at 177 (citation omitted).

In their discussion of so-called "limited fund" cases, Petitioners and their *amici* pay scant attention to the Second Circuit's opinion in *Drexel*, which approved Judge Pollack's certification of a mandatory non-opt-out class in securities litigation brought against the bankrupt brokerage firm.[17] In that case, Drexel agreed to create a $350 million fund to be administered by the SEC, which was to distribute the fund to the victims of Drexel's illegal transactions in "junk bonds." 960 F.2d at 288. Drexel paid $200 million into the SEC Fund in September 1989 and agreed to pay the remaining $150 million in two installments over the next three years. However, in February 1990 (before Drexel had paid any of the remaining $150 million), it filed a Chapter 11 bankruptcy petition. *Id.* To facilitate settlement of 850 claims arising out of Drexel's actions in buying, selling, and underwriting securities, Judge Pollack withdrew these claims from the bankruptcy

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[17] In this case, both the district court and the Fifth Circuit cited *Drexel* with approval. *See* CA 489a & n.2 (Conclusions of Law, ¶33), CA 231a-232a (162 F.R.D. at 526), CA 74a (90 F.3d at 983) (stating that in *Drexel*, 960 F.2d at 292, "the Second Circuit approved a [Rule] 23(b)(1)(B) class action on the ground that individual litigation would reduce the recovery for all plaintiffs from Drexel's limited assets").

court and ordered the establishment of the Securities Litigation Claimants Group, which eventually negotiated a settlement under which Drexel would pay the $150 million balance it owed the SEC Fund and the $350 million total would be divided between two subclasses. *Id.*[18]

Affirming Judge Pollack's certification of a (b)(1)(B) class and approval of the settlement agreement, the Second Circuit found the requirements of Rule 23 to have been satisfied:

> Drexel's assets to satisfy the Securities Claims are finite. A succession of individual actions to determine Drexel's liability on each claim would involve costly litigation, thereby depleting Drexel's already limited resources. The diminution of Drexel's estate from protracted litigation would doubtless reduce the amount ultimately recovered by each member of the putative class.

960 F.2d at 292 (citing *Robertson v. National Basketball Ass'n*, 556 F.2d 682, 685 (2d Cir. 1977)). Recognizing that "the limited fund here is quite different from the limited fund present in most class actions" certified under subdivision (b)(1)(B), in *Drexel* the court of appeals nevertheless found that the facts and circumstances of the case fit within Rule 23's necessarily broad and flexible confines

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[18] Petitioners characterize *Drexel* as holding that Rule 23 (b)(1)(B) certification was only "appropriate in connection with bankruptcy reorganization of Drexel's 'estate,' " Pet Brief. at 34 n.31 (citing *Drexel*, 960 F.2d at 288-92), ignoring the fact that Judge Pollack *withdrew* the securities claimants' claims from the bankruptcy court. The Second Circuit's opinion upholding certification of a subdivision (b)(1)(B) "limited fund" class in *Drexel* was in no way limited to cases involving bankruptcy reorganizations.

and affirmed Judge Pollack's approval of a non-opt-out class:

> [E]ven though Drexel's assets will not be distributed to claimants until final approval of Drexel's reorganization plan, some members of the putative class might attempt to maintain costly individual actions in the hope and, perhaps, the belief that their claims are more meritorious than the claims of other class members. A mandatory class action under Rule 23(b)(1)(B) is thus necessary here to prevent claimants with such motivations from unfairly diminishing the eventual recovery of other class members.
>
> For the same reasons that we find that the class can be maintained under Rule 23(b)(1)(B), we hold that the district court did not abuse its discretion in prohibiting any member of the putative class to opt out of the class. To allow a class member to opt out would involve costly litigation to estimate the amount of that member's claim, thereby reducing Drexel's already-limited fund of assets.

Id.

In this case, the district court and the Fifth Circuit followed the letter and spirit of Rule 23(b)(1)(B), as well as the reported cases cited and discussed above, conducted a thorough analysis of the facts and circumstances facing putative Class members and Fibreboard, and properly concluded that certification of a "limited fund" class was proper. *See* CA 233a-234a (162 F.R.D. at 527); CA 491a-492a (Conclusions of Law, ¶¶37-40); CA 72a-85a (90 F.3d at 982-88); CA 2a-3a (134 F.3d at 670). In any event, this was an *alternative* holding both of the district court and the appellate court. Thus, the decision of the Fifth

Circuit can be affirmed by this Court on the common "substantial risk" provision of Rule 23(b)(1)(B) alone.

CONCLUSION

For the reasons stated, NASCAT respectfully submits that the decision of the Fifth Circuit should be affirmed.

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Respectively submitted,

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